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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

DONALD J. BEARDSLEE, Plaintiff, **v.** **JEANNE WOODFORD, Director and JILL BROWN, Warden,** Defendants.	**CAPITAL CASE** C 04-5381 JF

DEFENDANTS' OPPOSITION TO MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

Date: January 6, 2005
Time: 1:30 p.m.
Courtroom: 3

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Donald Beardslee is scheduled to be executed on January 19, 2005. He was sentenced to death in 1984 by San Mateo County for crimes committed in 1981. To date every state and federal court to consider his case has denied relief. On December 20, 2004, he filed the present action pursuant to 42 U.S.C. § 1983 claiming that execution by lethal injection constitutes cruel and unusual punishment in violation of the Eighth Amendment and will violate his free speech rights

under the First Amendment.[1/] He seeks injunctive relief to prevent the scheduled execution. If the claims seem familiar, they are. With only two differences discussed below the complaint, most of the exhibits, and the memorandum of points and authorities are identical to those filed earlier this year by Kevin Cooper in an effort to stop his then-pending execution. In an order filed February 6, 2004, this Court denied the motion for a temporary restraining order and preliminary injunction. *Cooper v. Rimmer*, No. C 04-436 JF. Exh. 1.[2/] The Ninth Circuit affirmed that order. *Cooper v. Rimmer*, 379 F.3d 1029 (9th Cir. 2004). With but one passing reference, Motion. at 3, Beardslee fails to acknowledge, much less discuss, this Court's decision; he completely ignores the Ninth Circuit opinion. The motion in this case is equally lacking in merit.

PROCEDURAL HISTORY

Beardslee was convicted in San Mateo County Superior Court for the first degree murders of Patty Geddling and Stacy Benjamin, both of which were committed in April 1981. He was sentenced to death for the Geddling murder and to life without parole for the Benjamin murder in March 1984. The California Supreme Court affirmed the judgment in March 1991. *People v. Beardslee*, 53 Cal.3d 68, 279 Cal.Rptr. 276 (1991). That court subsequently denied two state habeas corpus petitions challenging the judgment.

In October 1992, Beardslee initiated federal habeas corpus proceedings in the United States District Court for the Northern District of California. In a series of unpublished orders issued in 1999, the district court dismissed or granted respondent's motion for summary judgment on the majority of Beardslee's claims. It denied the remaining claims in April 2001 following an evidentiary hearing. *Beardslee v. Woodford*, C 93-3990 SBA.

The Ninth Circuit affirmed the denial of relief and denied rehearing and rehearing en banc. *Beardslee v. Woodford*, 358 F.3d 560 (9th Cir. 2004). The Supreme Court denied certiorari,

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1. Although California authorizes both lethal gas and lethal injection as a method of execution, Beardslee insists that he will not select between the two; thus, he will be executed by lethal injection under the provisions of California Penal Code § 3604(b). Motion at 3.

2. Numbered exhibits accompany defendants' opposition; lettered exhibits were lodged by Beardslee.

Beardslee v. Brown, 125 S.Ct. 281 (2004), and rehearing. *Beardslee v. Brown*, ___ S.Ct. ___, 2004 WL 2692874 (2004).

Following denial of certiorari the San Mateo County Superior Court scheduled a hearing to set an execution date. The attorney who had been representing Beardslee for several years in federal court, and continues to represent him in this proceeding, complained that he had not been appointed as state counsel. He also expressed concerns about payment and his lack of experience in handling a clemency application. The California Supreme Court stayed the setting of an execution date and appointed the Habeas Corpus Resource Center (HCRC) as counsel for any further state post-conviction or clemency proceedings. The state court vacated the stay on November 22, and the San Mateo District Attorney scheduled a new hearing for December 16, 2004. After efforts to stay that hearing failed, the state court set Beardslee's execution for January 19, 2005. Beardslee filed the present complaint on December 20.

ARGUMENT

I.

BEARDSLEE IS NOT ENTITLED TO INJUNCTIVE RELIEF BECAUSE HE PREVIOUSLY LITIGATED THIS CLAIM ON FEDERAL HABEAS CORPUS

Although styled as a civil rights action, Beardslee's challenge to the method of execution is more properly cognizable in federal court as a habeas corpus claim. Indeed, Beardslee recognized as much by challenging the use of lethal gas and lethal injection in his amended petition for writ of habeas corpus. If properly characterized as a habeas corpus petition the complaint must be dismissed because the Ninth Circuit has not authorized the filing of a successive petition as required by 28 U.S.C. § 2254(b). We recognize, however, that the appropriate method for challenging an execution method is not entirely clear. The Ninth Circuit has held that "a challenge to a method of execution may be brought as a § 1983 action." *Fierro v. Gomez*, 77 F.3d 301, 305-306 (9th Cir. 1996). Although that issue was before the Supreme Court last term, the Court did not determine which vehicle is preferred. *Nelson v. Campbell*, 124 S.Ct. 2117, 2123 (2004). In *Cooper*, decided before the Supreme Court issued its opinion in *Nelson*, this Court held that § 1983 was an appropriate procedure for challenging the method of execution. Exh. 1 at 2.

Beardslee seeks an equitable remedy, and "[e]quity must take into account the State's strong interest in proceeding with its judgment and [any] obvious attempt at manipulation." *Gomez v. United States Dist. Court for Northern Dist. of Cal.*, 503 U.S. 653, 653-654 (1992) (per curiam). Citing *Gomez*, the Supreme Court emphasized in *Nelson* that before granting a stay of execution the court must consider "not only the likelihood of success on the merits and the relative harms to the parties, but also the extent to which the inmate has delayed unnecessarily in bringing the claim." There is a "strong equitable presumption against the grant of a stay where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay." 124 S.Ct. at 2126.

Beardslee first challenged California's prescribed method of execution in his second state habeas corpus petition, filed in 1996. His specific allegations focused exclusively on the use of lethal gas. Beardslee's entire reference to lethal injection alleged: "Subjecting Petitioner to death by lethal injection also constitutes cruel and unusual punishment violative of his Eighth and Fourteenth Amendment rights." He then added a footnote acknowledging the absence of a "valid legal basis" for the lethal injection claim. Exh. 2. Beardslee offered no factual allegations, declarations, or other exhibits to support his challenge. Relief was denied on the merits by the state supreme court.

Beardslee repeated his claim that the use of lethal gas is unconstitutional in the 1996 amended federal habeas corpus petition. He offered the same one-line allegation with respect to lethal injection, the same concession that his claim lacked any legal basis, and again failed to present any factual or documentary support for his assertion. Exh.3. Beardslee did not seek an evidentiary hearing on the claim and the district court granted summary judgment for respondent. Exh. 4. He did not seek a certificate of appealability to raise the claim on appeal to the Ninth Circuit. Throughout these proceedings Beardslee was represented, in whole or in part, by the attorney who filed this action.

It is clear Beardslee already had an opportunity to fully litigate his claim in the habeas corpus proceedings but failed to do so. He made no effort to provide evidentiary support for the allegations of his petition and there is no showing that the combination of drugs now used was

different in 1996 or that criticism of the state procedures he now asserts could not have been developed at that time. By not seeking an evidentiary hearing or a COA he effectively abandoned the claim. There is no doubt that if presented in an application for permission to file a second or successive petition this claim would be dismissed pursuant to 28 U.S.C. § 2244(b)(1). *See, e.g.*, *Nevius v. McDaniel*, 218 F.3d 940, 944 (9th Cir. 2000) (claims raised in first habeas petition must be dismissed); *Babbitt v. Woodford*, 177 F.3d 744, 746 (9th Cir. 1999) (same).

Assuming, in light of the Ninth Circuit's decision in *Fierro* and the Supreme Court's failure to resolve the issue in *Nelson*, that § 1983 is generally available as a means of challenging a method of execution, Beardslee, having earlier pursued the claim (however haplessly) on habeas, is not entitled to *re*litigate the claim under § 1983. Nothing in *Fierro*, *Nelson*, or any other case suggests otherwise. Not only would allowing Beardslee's ploy flaunt limitations on successive litigation imposed by Congress in the AEDPA, it would be inconsistent with the equitable concerns that inform the judiciary's treatment of last-minute filings to halt imminent state executions. Indeed, Beardslee's action reinforces the importance of restricting litigation of this sort when initiated after the setting of an execution date. Beardslee was obviously aware of the issue when he was litigating his habeas corpus petition and, based on the pleadings in this action, is certainly familiar with efforts by other death row inmates to challenge the use of lethal injection. Beardslee's own conduct to date forecloses his effort to secure injunctive relief. Accordingly, his motion should be denied.

II.

BEARDSLEE FAILS TO SATISFY THE REQUIREMENTS FOR INJUNCTIVE RELIEF

In order to obtain an injunction staying his execution Beardslee must show either (1) a likelihood of success on the merits and the possibility of irreparable injury, or (2) the existence of serious questions going to the merits and the balance of hardships tipping in his favor. *Roe v. Anderson*, 134 F.3d 1400, 1401-1402 (9th Cir. 1998). Wholly apart from his delay Beardslee's claim affirmatively lacks merit.

As noted above Beardslee seeks the same relief on essentially the same grounds rejected by this Court in the Cooper litigation. Except for the addition of a First Amendment claim, the

significance of which is discussed below, his complaint is indistinguishable from the one filed by Cooper. *Compare* Exh. 5, Cooper's complaint, *with* Beardslee's complaint. Again, with only one difference, his motion for a temporary injunction is identical. *Compare* Exh. 6, Cooper's motion, *with* Beardslee's motion.

On review of Cooper's complaints, this Court determined that Cooper did not meet his burden of demonstrating either the likelihood of success on the merits or the existence of serious questions going to the merits. Exh. 1 at 4. The Court noted the widespread acceptance of lethal injection as a valid method of execution and the decisions of other courts which had specifically rejected challenges similar to Cooper's. Exh. 1 at 4-6.[3/] Indeed, to date no inmate has succeeded in demonstrating any unconstitutional infirmity or shortcoming of lethal injection as a method of execution. *See, e.g.*, *Sizer v. Oken*, 124 S.Ct. 2868 (2004) (vacating stay of execution entered by district court based on challenge to lethal injection protocols; Oken was executed June 17, 2004); *Aldrich v. Johnson*, 388 F.3d 159 (5th Cir. 2004) (denying stay of execution based on challenge to lethal injection protocol; Aldrich was executed October 12, 2004); *Harris v. Johnson*, 376 F.3d 414 (5th Cir. 2004) (denying stay of execution based on challenge to lethal injection procedure; Harris was executed June 30, 2004); *Reid v. Johnson*, 333 F.Supp.2d 543 (E.D. Va 2004) (denying injunction based on challenge to lethal injection procedures and combination of drugs); *Reid v. Johnson*, 125 S.Ct. 25 (2004) (denying injunction; Reid was executed September 9, 2004).

Following this Court's order Cooper sought a stay from the Ninth Circuit. It too denied relief. Noting that it had "previously upheld the constitutionality of lethal injection as a method of execution," the circuit court observed that at least two states had rejected such claims under procedures similar to California but with "lesser dosages of anesthesia." *Cooper v. Rimmer*, 379 F.3d 1029, 103 (9th Cir. 2004). While acknowledging "there can be no guarantee error will not occur," the court held that Cooper fell "short of showing that he is subject to an unnecessary risk of constitutional pain or suffering such that his execution by lethal injection under California's protocol

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3. The declarations of experts upon which defendants relied in Cooper were lodged by Beardslee with his complaint. Exhs. R, S.

must be restrained." *Id.* at 1033. Beardslee makes no showing that the protocol to be used in his execution has changed since the Cooper litigation. Indeed, his extensive duplication of Cooper's complaint and motion effectively concedes they are the same. Accordingly, this Court's earlier order and its affirmance by the Ninth Circuit establish that Beardslee's motion is without merit. Beardslee's presentation must suffer the same fate, for there are no material differences between his submissions and Cooper's.

A. Alleged Violation Of First Amendment Rights

Cooper alleged that his execution under the present protocols for lethal injection would violate the First, Eighth, and Fourteenth Amendments by denying him access to the courts. He further alleged it would violate the right of the public to view the execution because they could not determine whether he was suffering pain. Exh. 5 at 8. Beardslee additionally contends that he has a First Amendment right to communicate information about failures in the execution protocols. He alleges that injection of pancuronium bromide will paralyze his voluntary muscles and thus violate his free speech rights. Complaint at 8-9. This allegation adds nothing to his showing.

If Beardslee is executed by lethal injection one of two scenarios will result:

1. He will remain conscious and experience tortuous pain, or

2. He will be unconscious from the combination of drugs and unable to experience anything.

If the second scenario occurs then Beardslee will suffer no violation of any federal constitutional right. If the first occurs Beardslee wants to be able to report the experience. The problem for Beardslee, however, is that scenario 1 assumes that he is correct about the likelihood of the injection protocols resulting in the conscious experience of tortuous pain. It is precisely the inadequacy of that showing which led this Court and the Ninth Circuit to deny injunctive relief in *Cooper*. Except as discussed below, Beardslee's showing with respect to the likelihood he will suffer pain is indistinguishable from the *Cooper* case. Alleging a desire to report on the effects of his execution does not improve to any extent the sufficiency of the showing that there will actually be anything to report. Beardslee's First Amendment complaint is make weight at best and provides no basis for enjoining the execution.

B. Reliance Upon Autopsy Reports From Executions In Other States

Cooper argued in reliance on the declaration of Dr. Mark Heath that the first drug, sodium pentothal, which is used to induce unconsciousness, could wear off, thus resulting in the prisoner experiencing extreme pain when the third drug, potassium chloride is injected. He claimed the second drug, pancuronium bromide, would paralyze him but not prevent him from experiencing the pain. Defendants submitted a declaration from Dr. Mark Dershwitz who demonstrated that all but an infinitesimally small number of people would be rendered unconscious within sixty seconds after administration of the dosage of sodium pentothal (or thiopental sodium as it is also called). "[V]irtually every person given five grams of thiopental sodium will have stopped breathing prior" to injection of the second, paralytic, drug. *Cooper v. Rimmer*, 379 F.3d at 1032. In conjunction with his declaration Dr. Dershwitz prepared charts demonstrating the likelihood of consciousness based on the blood concentration of sodium pentothal. The doctor concluded that the amount given in California "would render most people unconscious for a period in excess of 13 hours," substantially longer than any lethal injection in any state has lasted. Exh. R at R-4, ¶ 13.

Beardslee also relies on Dr. Heath, Exh. A, whose declaration is identical to the one submitted by Cooper with one exception. Since the Cooper litigation Dr. Heath has reviewed toxicology reports completed after executions in other states. Conceding that no autopsy or toxicology reports exist for any California execution, Exh. A at 7, ¶ 17, Dr. Heath nonetheless assets that the sodium pentothal levels reported after death raised "grave" or "serious" concern the inmates were conscious during the executions. Exh. A at 7-8, ¶¶ 18-19. In his motion Beardslee goes so far as to place the information from the other state executions on a copy of the chart prepared by Dr. Dershwitz in Cooper and concludes: "What [these results] suggest is that prison officials are not properly trained to administer anesthesia in prisoners, and that they will likely suffer an excruciatingly painful death as a result." Motion at 19. They show no such thing. Although Cooper did not include the information from other states in his complaint, this is not the first time a death row inmate has made use of that information.

In *Reid v. Johnson*, 333 F.Supp.2d at 546-548, the district court concluded in reliance on a declaration from Dr. Dershwitz that the *two* grams of sodium thiopental used in Virginia would

assure the inmate's unconsciousness. Reid sought to overcome that conclusion through reliance on Dr. Heath's consideration of "post-mortem blood toxicology reports of condemned inmates from other states," which, according to the doctor, raised a "possibility that the inmate may have been conscious during his execution." We set forth in full the district court's rejection of that argument:

> The lack of pertinent information regarding when and how the blood was gathered renders these reports of little value as a basis for rendering an opinion based on reasonable medical certainty as to the amount of sodium thiopental that had actually reached the inmate's system. Any probative value of the toxicology reports was further diminished by the lack of information regarding the specific chemicals used to execute the inmate described in the report and the unexplained presence of other sedatives. In short, the sodium thiopental level found in the toxicology report for a particular inmate is not indicative of the consciousness of that inmate during his execution, much less probative of whether a condemned Virginia inmate will be conscious throughout his execution.

333 F.Supp.2d at 548.

The defects *Reid* are just as obvious in Beardslee's complaint. Beardslee makes no effort to demonstrate how much of the drug was actually administered in each of the executions, how long the execution lasted, or how long after death the autopsy or toxicology studies were done. Dr. Heath's continuing concerns, which seem to evolve from case-to-case and state-to-state, do not establish a showing of irreparable injury sufficient to warrant a stay of execution. The district court in Virginia found "the chance that Reid will be conscious of any pain associated with the second two drugs of his death is less than 6/1000 of one percent." 333 F.Supp.2d at 551. That percentage is even lower here inasmuch as Beardslee will be given more than twice the amount of sodium thiopental used in Virginia. The "likelihood of [Beardslee] suffering irreparable harm from the manner in which the defendants intend to carry out his sentence is so remote as to be nonexistent." *Id.* Because Beardslee adds nothing to the showing made by Cooper, he provides no reason for this Court to grant him the injunctive relief rejected by the Court and the Ninth Circuit in *Cooper*.

CONCLUSION

For the reasons stated above defendants respectfully submit that the motion for temporary restraining order and preliminary injunction be denied.

Dated: December 23, 2004

Respectfully submitted,

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